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IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, INC.,

Petitioner,

v.

GULF POWER COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER NCTA

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner states that its name has changed to National Cable & Telecommunications Association, Inc. Petitioner has no parent corporations, and it has issued no publicly held stock.

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REPLY BRIEF OF PETITIONER NCTA

Respondents' briefs, like the decision below, are all premised on a fundamental error. Respondents never come to grips with the reality that both Section 224's terms and its underlying purposes establish a "facility-based" regulatory regime for cable attachments rather than a "service-based" one. The particular *rate* a utility may charge for access to its poles, ducts, conduits and rights-of-way may vary depending on the services an attachment will be used to provide. See 47 U.S.C. § 224(d), (e). However, the threshold question of whether that attachment is covered by Section 224 at all (the question at issue here) depends solely on whether it is a "pole attachment" – a term which includes "any attachment by a cable television system." *Id.* § 224(a)(4), (b)(1).

Congress made Section 224's coverage depend on the nature of the cable facility, rather than any specific service that facility might be used to provide, because Congress recognized that the same cable facilities simultaneously can carry a broad array of potential services – which over the years have included not only video programming but also data transmission, burglar alarm systems, FM radio, Internet access, and many others, and which in the future undoubtedly will include other services that cannot be predicted today. Section 224 has been applied to cable television systems' pole attachments because those systems, and therefore every service provided over them, depend upon a "physical, point-to-point connection" with cable subscribers. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 627-28 (1994). Congress recognized that cable television systems require access to the bottleneck facilities owned by utilities and that without the protections conferred by Section 224 such access would be subject to monopoly rates, terms, and conditions that would impede the provision of affordable services to the public.

Respondents do not dispute that this "facility-based" standard was the settled state of the law prior to 1996, see

Texas Utils. Elec. Co. v. *FCC*, 997 F.2d 925 (D.C. Cir. 1993), and they point to nothing in the 1996 amendments that remotely could support the sea change in that law that the Eleventh Circuit erroneously established. Nor do respondents even attempt to explain why Congress would have sought to stifle further development by penalizing innovative cable operators that expand their services by withdrawing regulatory protections upon which they rely so heavily.

ARGUMENT

I. CONGRESS DID NOT INTEND TO PENALIZE CABLE TELEVISION SYSTEMS THAT EXPAND THEIR SERVICES TO INCLUDE HIGH-SPEED INTERNET ACCESS BY SUBJECTING THEM TO MONOPOLY RATES, TERMS, AND CONDITIONS FOR ACCESS TO ESSENTIAL BOTTLENECK FACILITIES.

Respondents never directly address NCTA's core showing that the plain language of Section 224 requires the FCC to ensure that the "rates, terms, and conditions" for "any attachment by a cable television system" are "just and reasonable." 47 U.S.C. § 224(a)(4), (b)(1). They instead advance a litany of arguments for why this language should not be interpreted to mean exactly what it says.

1. Contrary to respondents' arguments, the FCC's authority to regulate the "rates, terms, and conditions" of attachments by cable television systems used to provide Internet access is not claimed to lurk, by "inference[]," within the "nooks and crannies" of some "hidden" statutory "mousehole." Brief for Respondents Atlantic City Elec. Co. *et al.* ("Atlantic City Br.") 11, 14, 23 n.13. Rather, that broad grant of authority resides in plain view in subsections (b)(1) and (a)(4) of Section 224. Subsection (b) requires the FCC to ensure that the "rates, terms, and conditions" of "pole attachments" are "just and reasonable." 47 U.S.C. § 224(b)(1). Subsection (a)(4), in turn, defines "pole

attachment" to mean "*any* attachment by a cable television system." *Id.* § 224(a)(4) (emphasis added). That express and unqualified language, by its terms, extends to an attachment by a cable system that provides commingled video programming and Internet access services.

Respondents argue that this conclusion should be rejected because "the FCC's jurisdiction under Section 224 would have no limit" and thus cable operators could use regulated pole attachments to "provide an electric utility service," "mount light fixtures," or "hang advertising banners." Brief of Respondent TXU Elec. Co. ("TXU Br.") 10-11; see also Atlantic City Br. 9; Brief for Respondents American Elec. Power Serv. Corp. *et al.* ("Am. Elec. Br.") 12. That concern is unjustified because Section 224 applies not to attachments by the owner of a cable television system, but only to attachments of a "cable television system" itself. 47 U.S.C. § 224(a)(4). Congress has defined "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming . . . ." 47 U.S.C. § 522(7); *id.* § 153(7) (same). That definition excludes "light fixtures," "advertising banners," electric utility lines and all other hypothetical attachments which are no part of a facility "designed to provide cable service." *Id.* § 522(7). That definition, however, does encompass attachments used to provide Internet access service along the same facilities used to distribute "video programming." *Id.*

Respondents argue, based on subsection (C) of Section 522(7), that the attachments at issue here are not part of a "cable television system." Am. Elec. Br. 18-22; Atlantic City Br. 23. They contend, in two steps, that (1) by virtue of their "delivery of residential and/or commercial telephone service," "most major cable companies" are "common carriers" that fall outside the definition of "cable system," and therefore (2) attachments by such cable operators also fall outside of

Section 224. Am. Elec. Br. 20; see also Atlantic City Br. 23. That argument was not raised before the FCC or the Eleventh Circuit, and, in any event, it founders at both steps.

First, respondents' claim that "most" cable operators fall outside the definition of "cable system" because they also provide telecommunications service should not be considered because it is based upon assertions that are outside the administrative record (and it is false, in any event, because most cable systems do not offer telecommunications service). Am. Elec. Br. 20. Further, this extra-record assertion regarding the common-carrier status of *most* cable operators, even if it were true, would not support the court of appeals' judgment that *all* cable operators who provide Internet access service fall outside Section 224. Second, even if these threshold problems could be ignored, respondents' legal argument fails at step two because if all cable operators fall outside the definition of "cable system" because they provide *telecommunications service*, then Section 224 still would apply to their attachments because they would be "provider[s] of telecommunications service." 47 U.S.C. § 224(a)(4).

In any event, respondents badly misapply Section 552(7)(C). Subsection (C) states that a "cable system" "does not include":

> a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services . . . .

47 U.S.C. § 522(7)(C). Respondents argue that this means "[w]here cable companies are common carriers," the facilities they use to provide Internet access are not part of a "cable system." Am. Elec. Br. 21. That is wrong. Subsection (C) states that "the facility of a common carrier" will not be

treated as a "cable system" even if "designed to provide cable service which includes video programming" *unless* that facility is actually "*used* in the transmission of video programming." 47 U.S.C § 522(7)(C) (emphasis added). Thus, subsection (C) prevents a facility of a telecommunications carrier from being regulated as a "cable system" so long as it is not "used" to provide "video programming." *Id.* It does not, however, exempt a facility "designed" *and* "used" to provide "video programming" from being treated as a "cable system" simply because it also provides Internet access.

2. Respondents' invocation of various canons of statutory construction fares no better.

a. For example, NCTA has not sought to "decouple" subsection (b)(1) from the remainder of Section 224. Am. Elec. Br. 13. Read together, the four subsections of Section 224 identified by respondents confirm the FCC's reading of Section 224. Atlantic City Br. 17; TXU Br. 8; Am. Elec. 13. Subsection (b)(1) grants the FCC authority to ensure that the "rates, terms, and conditions" of "pole attachments" are "just and reasonable." 47 U.S.C. § 224(b)(1). Subsection (a)(4) defines "pole attachment" as "*any* attachment by a cable television system." *Id.* § 224(a)(4) (emphasis added). Subsections (d) and (e), in turn, dictate how the Commission should exercise the authority granted in subsection (b)(1) to ensure "just and reasonable" "*rates*" in two circumstances. Subsection (d) provides a mechanism for determining "just and reasonable rates," *id.* § 224(d)(1), (2), and states that this mechanism "shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service." *Id.* § 224(d)(3). Subsection (e) provides a separate mechanism for determining "just, reasonable, and nondiscriminatory rates" for "pole attachments used by telecommunications carriers to provide telecommunications services." *Id.* § 224(e)(1).

These provisions together guarantee that the pre-existing "rate" mechanism in subsection (d) will continue to apply to "pole attachment[s] used by a cable television system solely to provide cable service." *Id.* § 224(d)(3). Where, however, a cable system uses its attachments also to provide telecommunications service in competition with other telecommunications providers, it will be subject to the rate set forth in subsection (e). *Id.* § 224(e)(1); see also S. Conf. Rep. No. 104-230, at 206 (1996). For all other circumstances, Congress commanded the FCC to "prescribe by rule," as it has done here, "regulations to carry out the provisions of this section," *i.e.*, to ensure that the "rates, terms, and conditions" of "any attachment by a cable television system" are "just and reasonable." 47 U.S.C. § 224(b)(1), (b)(2), (a)(4).

b. Respondents argue that this reading fails to recognize that the "general" language granting the FCC regulatory authority in subsections (b)(1) and (a)(4) is negated by the "specific" language in subsections (d) and (e). See, *e.g.*, Atlantic City Br. 16-17; Am. Elec. Br. 14. In respondents' view, subsections (d) and (e) not only define how the FCC should ensure "just and reasonable" "rates" for pole attachments in the circumstances identified in those subsections, but they also repeal, by negative implication, the FCC's established authority over the "rates, *terms, and conditions*" of pole attachments in all other circumstances. See Atlantic City Br. 16-17 ("'Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'") (quoting *Clifford F. MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944)); see also Am. Elec. Br. 13-14; TXU Br. 8-9. Neither the legal canon upon which they rely nor the language of subsections (d) and (e) can support the burden placed on them by respondents.

First, the rule that specific terms govern general ones has no relevance here because its application is predicated on a conflict such that the "specific statute" will not be "nullified by a general one." *Crawford Fitting Co.* v. *J.T. Gibbons,*

Inc., 482 U.S. 437, 445 (1987); see also *Warden* v. *Marrero*, 417 U.S. 653, 659 n.10 (1974) (rejecting reliance on canon where there was "no conflict"); *Great N. Ry. Co.* v. *United States*, 208 U.S. 452, 465-66 (1908) (same). To be sure, the "specific" language in subsections (d) and (e) defines "just and reasonable" "rates" for pole attachments in the circumstances identified in those subsections. As to other circumstances, about which Congress admittedly was aware, there can be no conflict between the general authority over "rates" reflected in subsection (b)(1) and the "specific" language in subsections (d) and (e) because the more "specific" provisions say nothing about what is a "just and reasonable" rate in those other circumstances. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 376 n.5 (1986) (rejecting argument that "'specific terms prevail over the general'" where general provision "addresses a different subject than [specific one]").[1]

Respondent TXU confirms that subsections (d) and (e) say nothing about other circumstances because it must rewrite Section 224 to achieve its desired result. According to TXU, "[t]he addition of the word 'solely' to [subsection (d)(3)] cannot be attributed to anything but a deliberate effort to limit subsection (d) rates *only* to attachments used for 'cable

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[1] Prior to 1996, the FCC and D.C. Circuit held that Section 224 applied to attachments in other circumstances. *See, e.g., Heritage Cablevision Assocs.* v. *Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099, 7101 (¶ 12) (1991) (Section 224 applies "regardless of the type of service provided over the equipment attached to the poles"), *aff'd* 997 F.2d 925, 927 (D.C. Cir. 1993); *WB Cable Assocs.* v. *Florida Power & Light Co.*, 8 FCC Rcd. 383, 386 (¶ 21) (1993) (Section 224 applies to attachment used to provide security alarm services). Respondents agree that "Congress is presumed to have been aware of the FCC's and the D.C. Circuit's interpretation of the Act." Atlantic City Br. 19; see also TXU Br. 13 n.5 ("Congress is aware of previous judicial and administrative constructions when it amends a statute"). Indeed, they admit Congress was aware of the FCC's decision in *Heritage* and D.C. Circuit's decision affirming *Heritage*. Am. Elec. Br. 2; TXU Br. 9-10; Atlantic City Br. 19.

services.'" TXU Br. 13 (emphasis added). But subsection (d) does not limit its application "*only* to attachments used for 'cable services'"; rather, it guarantees that subsection (d) will apply to attachments "used by a cable television system solely to provide cable service." 47 U.S.C. § 224(d)(3).

c. Similarly, respondents never address that implied repeals of the sort they advocate are disfavored and must be "clear and manifest." NCTA Br. 36-39. That omission is telling because, although they pay lip service to the notion that a statute "must be interpreted as a harmonious whole," Atlantic City Br. 17, the well-settled presumption against implied repeals is designed "to give *harmonious effect* to all acts on a subject where reasonably possible." 1A N. Singer, *Sutherland Statutory Construction* § 23.10, at 353 (5th ed. 1991) (emphasis added).[2] Specifically, "[w]here the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed." *Posadas* v. *National City Bank*, 296 U.S. 497, 504 (1936).

Nothing in the 1996 amendments to Section 224 supports the conclusion that Congress sought to limit the FCC's pre-existing authority over pole attachments. To the contrary, Congress expressly expanded the FCC's authority by extending Section 224 to pole attachments by a "provider of telecommunications" as well as a "cable television system. 47 U.S.C. § 224(a)(4). Moreover, Congress simply would not have repealed the FCC's pre-existing authority over the "rates, terms, and conditions" of pole attachments in the manner suggested by respondents – *i.e.*, by modifying one provision (subsection (d)) and adding another (subsection (e))

[2] Respondent TXU tersely insists that this rule should not apply here because "[w]hen Congress changes a law, courts must give effect to those changes." TXU Br. 12 n.3. But that is no response at all because the presumption against implied repeals necessarily involves the enactment of a new law – here, the 1996 amendments to Section 224 – and its purpose is to determine, in TXU's words, how to "give effect to those changes."

that deal solely with "rates" but say nothing about the Commission's authority over "terms, and conditions." See 47 U.S.C. § 224(b)(1).[3] That conclusion is inescapable in light of the "heavy burden of persuasion" that a party advocating such a repeal bears. *Amell* v. *United States*, 384 U.S. 158, 165-66 (1966).

d. Alternatively, respondents argue that "deregulating cable company attachments when cable companies enter the competitive marketplace for Internet access" was, perhaps, an "unanticipated consequence[]" of Congress' decision to "extend[] the 'cable system' definition (47 U.S.C. § 522(7)) to the entire Communications Act. 47 U.S.C. § (153(7))." Am. Elec. Br. 21-22; TXU Br. 12. As demonstrated above (*supra* at 3-5), that argument is wrong because an attachment used to provide commingled Internet access and video programming clearly falls within the definition of "cable system." See Am. Elec. Br. 9, 19. Moreover, the claim that Congress in 1996 would have thought that extending the definitions from the 1984 Cable Act to Section 224 was the way to repeal the FCC's established authority under Section 224 is frivolous because the FCC held in 1991 that the Cable Act of 1984, to the extent it was relevant, *supported* its conclusion that Section 224 applied to attachments by cable systems "regardless of the type of service provided over the equipment." *Heritage Cablevision Assocs.* v. *Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099, 7101 (¶ 12) (1991), *aff'd*, 997 F.2d 925 (D.C. Cir. 1993).

Indeed, in *Heritage*, the FCC quoted the House Report accompanying the 1984 Cable Act, which explained:

[3] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 FCC2d 59, 74 (¶ 33) (1979) (Section 224 "vests" FCC "with the responsibility for regulating not only the rates but also the terms and conditions of CATV pole attachments"), *aff'd*, 655 F.2d 1254 (D.C. Cir. 1981); *see, e.g.*, *Texas Cable & Telecomms. Ass'n* v. *Entergy Servs., Inc.*, 14 FCC Rcd. 9138, 9144 (¶ 17) (1999) (engineering survey was unreasonable term or condition).

> "The term 'cable system' is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well."

Id. at 7104 (¶ 24) (quoting H.R. Rep. No. 98-934 at 44 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4681). Further, that 1984 House Report recognized that "many cable facilities, especially those built in recent years, have been constructed with the capability of providing 'two-way' services, such as transmission of voice and data traffic, and transactional services such as at-home shopping and banking." H.R. Rep. No. 98-934, at 27 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 4664; see also note 1, *supra*.

Respondents' recognition that their interpretation rests on possible "unanticipated consequences" of Congress' 1996 amendments, Am. Elec. Br. 22, highlights their inability to provide a plausible rationale for why Congress would have established the statutory scheme they advocate. Under that scheme, a cable operator would be penalized – through the loss of regulatory protections necessary to ensure access to essential bottleneck facilities – when, through innovation and investment, it is able to provide new services to subscribers.

On this point, respondents acknowledge the "dramatic" growth of the services provided by cable operators and admit that Congress, "[i]n recognition of this growth, and the . . . potential for continued growth," "established a national policy" to encourage such development. Atlantic City Br. 2-3. Given these facts, Congress would not have – and did not – enact a statutory scheme designed to stifle further development by withdrawing essential regulatory protections if cable operators provide new and innovative services. Respondents' interpretation is all the more implausible where, as here, the "service" is Internet access for which Congress independently has adopted a policy to "promote . . . continued development." 47 U.S.C. § 230(b)(1).

Respondents have no explanation for the perverse incentives created by their strained reading of Section 224. Instead, they argue, ironically, that the plain meaning of Section 224 should be disregarded because it would be "odd" or "absurd" for Congress to have "constrained the FCC's authority to regulate the rates charged for pole attachments used to provide" cable service and telecommunications service "while requiring the FCC to regulate attachments used to provide other services, but leaving its discretion to do so unfettered." TXU Br. 11. But, allowing "consequences thought to be absurd" to justify a departure from plain meaning "so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter." *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930). More recently, this rule has been described as a "narrow" one, applying only if "the plain language of the statute would lead to 'patently absurd consequences' that 'Congress could not *possibly* have intended.'" *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring in judgment) (internal citation omitted).

This "narrow" exception does not assist respondents because the statutory scheme, as reflected in the plain language of Section 224, is neither "odd" nor "absurd." That scheme protects the existing interests of cable television systems by guaranteeing that the rates that utilities charge them for pole attachments will remain the same if their attachments provide "solely cable service." 47 U.S.C. § 224(d)(3). It also protects the interests of telecommunications providers by creating a level playing field if a cable television system uses its attachments to provide telecommunications service. *Id.* § 224(e)(1). As for all other attachments by cable television systems – used to provide other existing services or services that may be developed in

the future – Congress was entirely justified in granting the Commission discretion to ensure that the "rates, terms, and conditions" would be "just and reasonable" as those services evolve. *Id.* § 224(b)(1). That was certainly not "absurd," particularly since the alternative would have been to strip regulatory protection from facilities used to provide video programming whenever, and merely because, those facilities also provide additional services.

e. Finally, respondents argue that Section 224 must be "construed narrowly" "so as to take as little private property as possible." Atlantic City Br. 20. That argument is meritless both legally and factually. In *United States* v. *Riverside Bayview Homes, Inc.*, this Court explained that the Takings Clause prohibits only uncompensated takings. 474 U.S. 121, 128 (1985). Thus, if "compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional," and therefore the "adoption of a narrowing construction" is not necessary for "avoidance of a constitutional difficulty." *Id.*

Here, even assuming *arguendo* that Section 224 authorizes a taking (as it does not),[4] it also unambiguously ensures utilities "just and reasonable" compensation. 47 U.S.C. § 224(b)(1). Because there is no issue regarding "avoidance of a constitutional difficulty," there is no reason to adopt a narrowing construction "so as to take as little private property as possible." Atlantic City Br. 20. But even if there were, respondents' argument ignores that cable systems provide Internet access service over the *same* facilities they use to provide video programming. NCTA Pet. App. 63a (¶ 30). As a result, no additional property is "taken" when a cable

[4] *See Metropolitan Transp. Auth.* v. *ICC*, 792 F.2d 287, 297 (2d Cir. 1986) ("requiring one public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement, to deliver service to the public fits more into the regulatory rather than the taking mode as those terms have traditionally been applied").

system decides to provide Internet access as well as video programming. Simply put, respondents' construction does not narrow the "scope of the taking," and therefore can have no bearing on the analysis of Section 224.

3. Respondents' policy arguments provide no basis for departing from the plain language of the Section 224.

a. Respondents contend that allowing cable systems that provide Internet access over the same facilities used to provide video programming constitutes "regulation" of the "Internet." Atlantic City Br. 8, 12-13, 32-33; Am. Elec. Br. 29. They argue that such regulation is contrary to 47 U.S.C. § 230(b)(2), which provides that "It is the policy of the United States . . . (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* This argument misconceives the character of regulation under Section 224.

Section 224 does not regulate the "Internet." It regulates "utilities" that own or control "poles, ducts, conduits, or rights-of-way." 47 U.S.C. § 224(a)(1), (a)(4). In contrast, Section 230(b)(2) is a policy statement that the Internet itself should remain free from Federal and State regulation. *Id.* § 230(b)(2). As a result, Section 230(b)(2) has no bearing on Section 224. Indeed, just as no one would seriously claim that Section 230(b)(2) prohibits the FCC from regulating the facilities of cable operators or telecommunications carriers merely because those facilities may be used to provide Internet access (as well as other services), so too is Section 230(b)(2) irrelevant to the FCC's authority to prevent utilities from demanding monopoly rents for access to the bottleneck facilities that cable operators use to provide Internet access.

b. Respondents' related argument that cable systems are seeking a "subsidy" that will give them an unfair economic advantage over similarly situated entities is baseless. See Am. Elec. Br. 29-30; Atlantic City Br. 10. There is no

"subsidy." Section 224 was enacted to prevent utilities from charging monopolistic rates and imposing unjust and unreasonable terms and conditions on cable systems that require access to these facilities so they can provide service to their customers. See *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 247 (1987). Indeed, the rate adopted by the FCC is a cost-based rate, not a subsidized rate.

Further, the FCC's interpretation of Section 224 is eminently fair to the other entities whose interests respondents purportedly seek to protect – incumbent local exchange carriers, satellite-based ISPs, and facilities-based ISPs – and to whom section 224 does not apply. See Atlantic City Br. 34. First, incumbent local exchange carriers ("ILECs"), which are excluded from the benefits of Section 224, 47 U.S.C. § 224(a)(5), do not need access to telephone poles because those facilities are "usually owned by telephone and electric power utility companies, which often have entered into joint use or ownership agreements." S. Rep. No. 95-580, at 12 (1977). Indeed, no ILEC has joined the respondents' argument that Section 224 should not apply to cable operators because ILECs are excluded from its benefits.[5] Nor are satellite-based ISPs similarly situated to cable systems because, as respondents acknowledge, Atlantic City Br. 34, they have no need for access to poles. Finally, NCTA is unaware of *any* "facilities-based" ISP that is neither a cable system nor telecommunications provider. Respondents purport to identify only one (Earthlink), *id.*, but are mistaken because Earthlink "do[es] not have [its] own transmission facilities." Brief of Earthlink, Inc. as *Amicus Curiae* in Support of Neither Party ("Earthlink Br.") 2.

c. Respondents' final policy argument is based on the rate ultimately adopted by the FCC for attachments used by

[5] *See* Brief for the United States Telecom Ass'n *et al.* as *Amici Curiae* in Support of Reversal ("USTA Br.") 7 (arguing that high-speed Internet access provided by cable systems is protected by Section 224).

cable operators to provide Internet access service. See Atlantic City Br. 36-37; Am. Elec. 12. They argue that the FCC's adoption of the subsection (d) rate structure for attachments by cable systems used to provide Internet access "tilt[s] the scales in favor of multimedia cable companies at the expense of telecommunications carriers," because, respondents contend, the subsection (e) rate "is likely several times higher than the [subsection (d)] rate." Atlantic City Br. 36, 37.

The question presented here, however, is whether the FCC can regulate such attachments at all under Section 224, *not* whether the rate ultimately chosen by the FCC, once regulatory authority is established, was appropriate.[6] But even if the rate adopted by the FCC were relevant, respondents' position would create a far more serious "disparity," by subjecting cable systems that provide Internet access to unregulated monopolistic rates while allowing telecommunications providers that provide Internet access to receive regulated rates under subsection (e). See TXU Br. 14 n.6 (rejecting claim that "telecommunications carrier would lose its Section 224(e) attachment rights" by providing Internet access).

4. Finally, even if Section 224 could be viewed as ambiguous, respondents have failed to show that the FCC's interpretation does not warrant deference under *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[7] TXU's argument that deference is inappropriate

[6] In any event, adoption of the subsection (d) rate is reasonable because, as the FCC explained, it is consistent with the goal of "encourag[ing] cable operators to make Internet services available to their customers," whereas, "specifying a higher rate might deter an operator from providing non-traditional services." NCTA Pet. App. 64a (¶ 32).

[7] The *Chevron* framework applies here because Congress ordered the FCC to implement Section 224 through regulations, 47 U.S.C. § 224(b)(2), and the Order at issue here is the result of notice-and-

because the FCC should have determined the regulatory character of Internet access service provided by a cable system before it determined whether these attachments receive a "regulated rate under Section 224" is nothing more than a disagreement with the FCC's analysis of Section 224. TXU Br. 15; Am. Elec. Br. 17. That disagreement provides no basis for denying deference to the FCC's conclusions.

The relevant inquiry is whether the FCC's analysis is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In this case, the FCC has adopted, at a minimum, a permissible reading of Section 224 that recognizes that Congress did not withdraw regulatory protections from cable systems that expand their services to provide Internet access over the same lines used to provide video programming. That ruling is entitled to deference.[8]

II. EVEN IF THE COURT CONCLUDES THAT ATTACHMENTS ARE PROTECTED BY SECTION 224 ONLY IF THEY ARE USED TO PROVIDE "TELECOMMUNICATIONS SERVICE" OR EXCLUSIVELY "CABLE SERVICE," IT SHOULD ALLOW THE FCC TO DETERMINE WHETHER INTERNET ACCESS PROVIDED BY A CABLE TELEVISION SYSTEM IS A "CABLE SERVICE."

As we demonstrated previously, if the Court concludes that the court of appeals was correct in concluding that only attachments by cable systems used for telecommunications service or exclusively for "cable service" are covered by Section 224, its judgment still should be reversed to allow the

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comment rulemaking. *Cf. United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2175 (2001).

[8] Respondents also are off-base in arguing that the FCC has unduly delayed in determining the character of Internet access provided by a cable system. *See* Am. Elec. Br. 27-28. Indeed, they acknowledge the FCC has initiated a proceeding to decide that issue. Atlantic City Br. 27.

FCC to determine, in the first instance, whether high-speed Internet access service provided by a cable system is a cable service. NCTA Br. 42-44. A remand would allow the FCC to assemble an adequate record so that it could consider the arguments that are necessary for it properly to exercise its judgment in this matter. *Id.* at 43-44.

Respondents too recognized that "[t]his is simply the wrong case for ruling on the regulatory status of the Internet" because that "determination should be made in the first instance by the policy-making branches of government, on the basis of a full and complete record, not by this Court." Brief in Opposition 15. Respondents warned that the Court should not "make this decision preemptively" and should "allow the question . . . to be addressed by the FCC in its ongoing rulemaking proceeding." *Id.* at 14-15. Indeed, respondents acknowledged that resolution of the issue of whether "Internet service" provided by a cable system is a "'cable service' or a 'telecommunications service' . . . presents ramifications for controversies well beyond the scope of this proceeding and with far greater and more pervasive implications than pole attachments." *Id.* at 13.[9]

Respondents now, however, ask the Court to ignore the pending FCC proceeding that will address this very issue, to deny the FCC an opportunity to determine this claim on remand, and to leapfrog – as did the court of appeals – the administrative process by ruling that a cable system that provides Internet access is providing neither a "cable service" nor a "telecommunications service." Atlantic City Br. 24-31; Am. Elec. Br. 22-28; TXU Br. 16-17. Respondents

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[9] The broad impact of such a ruling has resulted in a host of briefs by *amici* with other agendas. *E.g.*, Brief of *Amici Curiae* Consumers Union, *et al.*, in Support of Neither Party 3 (arguing that improper classification of cable Internet access may "endanger the free and open character of the Internet"); Earthlink Br. 2 ("how the statutory classification question is answered will determine . . . whether ISPs . . . will be able to purchase use of transmission facilities from cable operators").

acknowledge that "further clarification might arguably be needed . . . on the issue of cable modem service," but they insist that this case involves a "straightforward interpretation of unambiguous statutory definitions." Atlantic City Br. 31. But even a cursory examination of the conflicting arguments presented by respondents and *amici* confirms that the ultimate resolution of this issue would benefit from the FCC's analysis. See, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903, 919 (2001) (remanding issue "to the EPA to develop a reasonable interpretation").

First, respondents and *amici* are wrong when they contend that cable Internet access is not "cable service." See Atlantic City Br. 28; Am. Elec. Br. 22-25. "Cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). The term "other programming service," in turn, "means information that a cable operator makes available to all subscribers generally." *Id.* § 522(14). Cable Internet access makes available to subscribers, generally, information with which the subscribers interact by selecting and then using it. Those services therefore are encompassed within this statutory definition, as the legislative history confirms. See H.R. Rep. 104-458, at 169 (1996) (current definition of "cable service" intended to "reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator as well as enhanced services").[10]

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[10] Respondents, relying on the Ninth Circuit's decision in *AT&T Corp.* v. *City of Portland*, 216 F.3d 871, 876 (2000), argue that "cable service" is limited to "'one-way'" transmission, whereas Internet service is "'interactive.'" Atlantic City Br. 28; *see* Am. Elec. Br. 23-24 (same). But that argument ignores that that the statutory definition expressly includes "subscriber interaction" that involves the "selection" or "use" of information provided by the cable system. 47 U.S.C. § 522(6)(B).

Finally, on the issue whether cable Internet access is a "telecommunications service," both NCTA and respondents agree that it is not. See Atlantic City Br. 29-30; Am. Elec. 25-28. The arguments of *amici* who contend that the court of appeals should be reversed because, in their view, Internet access provided by a cable service is a "telecommunications service" are not properly before the Court. See, *e.g.*, USTA Br. 16-24. First, "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). Here, the FCC did not base its ruling on the ground that Internet access provided by a cable system is a telecommunications service. See NCTA Pet. App. 62a-63a, 66-67a (¶¶ 30, 34). Moreover, although *amici* have purported to file on the side of petitioners, they are actually seeking to have the FCC's rules *vacated* because their argument would require the application of a different rate formula – the formula of Section 224(e) for attachments that include telecommunications services – than the one chosen by the FCC. The Court generally does not consider arguments by *amici* that have not been advanced by the parties, and that principle should particularly apply where, as here, *amici* are seeking *vacatur* of a portion of an agency order. *See*, *e.g.*, *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (declining to consider argument by an *amicus* "since it was not raised by either of the parties here or below"); *United States* v. *Dion*, 476 U.S. 734, 736 n.3, 746 (1986) (same).

In any event, *amici* are plainly wrong in contending that cable Internet access is a "telecommunications service." USTA Br. 16-25; Earthlink Br. 16-29. The FCC has concluded that Internet access is an "information service" and that "telecommunication services" and "information services" are "mutually exclusive." *Federal State Joint Bd. on*

Universal Serv., 13 FCC Rcd. 11501, 11520 (¶ 39) (1998) ("*Universal Serv. Report*"). An "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). A "telecommunications service," by contrast, is "the offering of telecommunications for a fee directly to the public," *id.* § 153(46), and "telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Thus, carriers provide "telecommunications services" when they offer customers a pure transmission path with which to send and receive the customers' own information, while information service providers (such as, for example, ISPs or LEXIS) do not offer that pure transmission path to their subscribers. As the FCC has explained, a firm that offers an information service "does not provide telecommunications; it is using telecommunications." *Universal Serv. Report*, 13 FCC Rcd. at 11521 (¶ 41).

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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